Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Alliance for Public	)	
Technology Requesting Issuance of	)	RM 9244
Notice of Inquiry And Notice of	)	
Proposed Rulemaking to Implement	)	
Section 706 of the 1996	)	
Telecommunications Act	)	

REPLY COMMENTS OF
SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its affiliates including its incumbent local exchange carrier ("LEC") subsidiaries that are Bell Operating Companies ("BOCs") (collectively, "SBC"), files these Reply Comments regarding the Alliance for Public Technology's February 18, 1998, Petition ("APT Petition"). With these Reply Comments, SBC demonstrates that section 706 confers substantive authority on the Commission, independent of the requirements or limitations of section 10. To interpret section 706 otherwise would violate fundamental principles of statutory construction and fail to give effect to the express will of Congress.

The comments revealed a predictable difference of opinion on the issue of whether section 706 constitutes a separate grant of authority to the Commission. SBC submits that any reading that attempts to make section 706 dependent upon or otherwise subject to section 10

ignores the plain language of section 706, would not permit sections 10 and 706 to be reconciled in a manner that gives meaning to the words used in each,[1] and would reach an absurd result.[2]

The goal of interpreting a statute is, of course, to effectuate the intent of Congress, and the best evidence of that intent is the statutory language itself. Section 706(a) states that:

> *The Commission* and each State commission with regulatory jurisdiction over telecommunications services *shall encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability *to all Americans* (including, in particular, elementary and secondary schools and classrooms) by utilizing, *in a manner consistent with the public interest, convenience, and necessity*, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. (emphasis added)

Like WorldCom, SBC believes that the precise language of section 706 is worth parsing in some detail; unlike WorldCom, however, SBC asserts that the conclusion that must be drawn from the language is that section 706 is a separate grant of substantive authority to the FCC.

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[1] Statutes are to be construed to give meaning to each word enacted by Congress. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). The Commission has cited and relied upon this principle in construing the 1996 Act. *See The Public Utility Commission of Texas, et al., Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol 96-13, 96-14, 96-16, and 96-19, Memorandum Opinion and Order, FCC 97-346, ¶ 43 (October 1, 1997) ("It is a fundamental principle of statutory construction that 'every word and clause must be given effect'".); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, 11 FCC Rcd 21905, ¶ 156 (1996) ("This conclusion [that "operate independently" imposes separate requirements] is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions.").

[2] *See* United States v. Turkette, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided").

First and foremost, Congress has mandated Commission action. The term "shall" imposes a requirement, and not a matter of discretion.[3] WorldCom's inordinate focus of where that "shall" command was codified misses the point entirely. A mandate imposed by Congress on the Commission is a mandate regardless of where it may reside in the United States Code or even whether it was codified there at all. There is no "hierarchy" of laws based upon how the law is codified that permits the FCC to rank mandates in varying levels of importance. Section 706 was a law properly enacted by Congress and signed by the President, and is accorded no less respect as a law of the United States due to what is effectively a numbering issue.[4] The Bill of Rights amended the United States Constitution, yet the Supreme Court has hardly treated those contemporaneous declarations as stereotypical stepchildren because they were not placed in the body. The Commission must obey that section 706 mandate regardless of where it is found, and give it equal status in its implementation as the FCC has other mandates of the 1996 Act.

That mandatory action is to "encourage," a word choice that cannot be overlooked or overemphasized. SBC agrees with WorldCom that the plain meaning of "encourage" is "to spur on" and "to give help or patronage to."[5] But WorldCom seeks to downplay the word by

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[3] *See, e.g.*, Assoc. of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977). Although courts sometimes construe "shall" as discretionary in certain contexts, that interpretation cannot be made in a context where the mandatory direction in section 706(a) is followed in section 706(b) by a mandatory process with deadlines to discharge that direction.

[4] There already existed a 47 U.S.C. § 706 when the Telecommunications Act of 1996 ("1996 Act") was passed.

[5] WorldCom, p. 10 (citing Webster's II New Riverside University Dictionary (Houghton (continued...)

claiming "the FCC is directed only to 'encourage' deployment," WorldCom, p. 10, and then essentially ignores the word choice Congress made and the resultant need for affirmative Commission action that provides encouragement. The FCC does not have that luxury. The FCC cannot "spur on" or "give help" to the deployment of advanced telecommunications capability by doing nothing, or just talking about its desire for deployment. Congress envisioned specific FCC action targeted at providing incentives to infrastructure investment in those technologies; passivity to that Congressional objective -- and especially where deployment is lacking -- cannot meet the base requirement of the Commission's affirmative section 706 obligation. Likewise, blind devotion to regulatory prohibitions, restrictions, and limitations to the detriment of that objective also cannot be countenanced under the plain language of section 706.

Further, Congress clearly indicated that incumbent LECs were not to be excluded from section 706 relief as some commenters wish. The Commission has been given broad authority to "utilize . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Section 706(b). Obviously, the fact that Congress specifically authorized the use of "price cap regulation" as a tool demonstrates that section 706 relief was authorized for incumbent LECs since only they are subject to earning regulation; Congress

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[5](...continued)
Muffin Co. 1988). Other dictionaries are in accord. *See* Random House Unabridged Dictionary (2d ed. 1993) ("encourage" means "to stimulate by assistance, approval, etc.").

clearly did not authorize "price cap regulation" for non-dominant carriers that, as a class, are not subject to any earning regulation before (or since) passage of the 1996 Act.

Some commenters trumpet the fact that the section 706 authority must be used "in a manner consistent with the public interest, convenience, and necessity"[6]-- recognized by WorldCom as a "classic public interest test."[7] Far from being supportive of those who argue against separate section 706 authority, however, that requirement conclusively demonstrates independence from section 10.

The reason is that section 10 has its own "public interest" test. *See* section 10(a)(3) ("consistent with the public interest"). Under the interpretation urged by those who oppose the APT petition, section 706 is subservient to section 10, and that the use of "forbearance" in section 706 is only a reference to the Commission's authority in section 10(a).[8] Those commenters then depend upon the fact that section 10(a) authority cannot be used to forbear from sections 251(c) and 271 requirements until those requirements have been "fully implemented." What those commenters fail to address is that such an interpretation would render the public interest test in either section 10(a) or section 706 superfluous or redundant, thus violating the fundamental tenet of statutory construction that every word in a statute should be given

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[6] WorldCom, p. 11, NARUC, p. 4.

[7] WorldCom, p. 11.

[8] *See* LCI, Attachment A, p. 18; Sprint, p. 4.

meaning.[9] To give each test meaning requires that section 706 be treated as a separate grant of authority.

Similarly, to construe section 706's "public interest" test as somehow in addition to section 10's (and that both must be met) would be to conclude that Congress intended an absurd result. In essence, that interpretation would mean that Congress intended that one (section 706) would only act as a filter that would first have to be passed before one could even get to the second (section 10). Those commenters would thus have the FCC conclude that, in the context of an infrastructure investment goal so important to Congress that it established a separate mandate to affirmatively encourage deployment, Congress wanted to make forbearance *more difficult to obtain.* After all, without section 706, the Commission can grant forbearance from "any regulation or any provision of the [Communications Act of 1934, as amended]" under section 10(a) and apply only its single three-part test. Under the formation of those who oppose

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[9] The fact that "public interest" tests are worded differently provides no basis for arguing the two are different legal standards and that both can somehow be given effect because of such a difference. Neither the Commission nor the court have differentiated between the various formulation of the "public interest" test. *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, ¶ 384 n.989 (1997) (various statutory "public interest" formulations referred to as "consistent with the public interest, convenience, and necessity"); *Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application*, 96 F.C.C. 2d 18, ¶ 66 n.73 (1983) ("neither the courts nor this Commission appear to have placed any significance upon the different [public interest] language [in 47 U.S.C. §§ 214, 310(d)] and many cases use the terminology interchangeably"); Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101, 106 (D.C. Cir. 1987) (the Court equates various formulations of "public interest" standard).

APT's interpretation, the FCC would have to apply another test and then still apply the section 10 test. Under that interpretation, the FCC could find that a proposed request for forbearance was in the "public interest" under section 706 -- thus meeting the Congressional objective -- but not under section 10(a), and thus would be required to deny the request. Such a formulation is both fanciful and nonsensical to say the least.

Instead, Congress established section 706 authority for an entirely different purpose than section 10 authority and correspondingly set an different standard for its exercise. The purpose of section 706 is succinctly embedded in the provision itself -- to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans".[10] In contrast, the purpose of section 10 is to eliminate regulation where it is no longer needed. Because these are two fundamentally different objectives, with no logical or other relationship, Congress accordingly established two separate standards for the use of the authority granted in each. Forbearance under section 10 must meet a three-part test, only one part of which is the

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[10] The Senate history on section 304 of S.652, the precursor to section 706 that had no counterpart in the House Bill, only serves to reinforce that strong message.

> Section 304 of the bill is *intended to ensure* that one of the primary objectives of the bill -- to accelerate deployment of advanced telecommunications capability -- is achieved. . . . The Committee believes that this provision is *a necessary failsafe* to ensure that the bill will achieve its intended infrastructure objective.

Senate Report on S. 652 (Report No. 104-230), p. 50 (emphasis added). The "Joint Explanatory Statement of the Committee of Conference" noted that "[t]he conference agreement adopted the Senate provision with a modification." Conference Report on S. 652 (Report No. 104-458), p. 210.

public interest; section 706 forbearance must only be in the public interest. Neither was textually made dependent on the other, and cannot reasonably or logically be so read.

Finally, those arguing against independent 706 authority ignore the fact that the Congressional goal is intended to benefit "all Americans (including, in particular, elementary and secondary schools and classrooms)". When the 1996 Act was written, Congress understood that competition would be slow, perhaps extremely slow, to come to more rural, insular areas.[11] Under the interpretation urged by those opposing APT's petition, the FCC would be legally precluded from forbearing from section 251(c) requirements until "fully implemented" by a rural incumbent LEC notwithstanding the need for relief to encourage investment by that rural incumbent. In other words, those opposing -- new entrants chief among them -- want the

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[11] *See, for example*, 142 Cong. Rec. E238, Hon. Lee H. Hamilton, Representative from Indiana ("The bill contains protections for rural communities, which may see less competition because of the high cost of providing service to these areas."); 141 Cong. Rec. S 17847, Hon. Byron L. Dorgan, Senator from North Dakota ("[T]he market system is not going to decide that the income stream in a rural State is going to persuade people to come and engage in robust competition to provide new services in rural areas. . . . One [concern] is, you do not have competition in many rural areas. Often you have a circumstance where you only have one interest willing to serve, and that service sometimes has to be required. The economics simply do not dictate service."). This understanding, which has been confirmed by experience in the two years since passage of the 1996 Act, has been recognized by the FCC as well. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, 12 FCC Rcd 15982, ¶ 331 (1997):

> Small and rural LECs will most likely not experience competition as fast as incumbent price cap LECs. We do not expect small and rural LECs generally to face significant competition in the immediate future because, for the most part, the high cost/low-margin areas served by these LECs are unlikely to be the immediate targets of new entrants or competitors.

exercise of section 706 authority for incumbent LECs to be partially conditioned on the new entrants' own business plans and decisions (*e.g.*, when, where, and how to enter a local exchange market).[12] SBC submits that Congress did not condition section 706 so as to permit rural America to be held hostage to new entrants who cannot find enough cream to skim to make rural areas worth their while.[13] In fact, so important was the goal of deploying advanced telecommunications capability that Congress included the same concept as a principle of universal service, with a special emphasis for schools and libraries. *See* 47 U.S.C. §§ 254(b)(2), (6). Section 706 must be read as providing independent authority, separate and distinct from section 10, in order to ensure that "all Americans" are included in the on-going technology revolution.

Conclusion

In sum, Congress has directed affirmative action by the Commission to actively spur on deployment of advanced telecommunications capability for "all Americans". To do so, Congress

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[12] In light of the approach taken by the Commission in determining whether a BOC has met the section 251(c) portions of the competitive checklist of section 271, those new entrants are undoubtedly counting on their interpretation coupled with the "fully implemented" language of section 10(d) to block an incumbent LEC from getting relief it may need from section 251(c) or 271 to deploy the Congressional-favored technologies notwithstanding the detrimental effect on achieving the objective of section 706.

[13] The legislative history is to the contrary. *See* 141 Cong. Rec. S 7942, Hon. Ted Stevens, Senator from Alaska ("We are talking about telecommunications connections which will enable people in rural America to have computer services just like everyone else."); 142 Cong. Rec. H 1145, Hon. Blanche Lambert Lincoln, Representative from Arkansas ("[M]y primary concerns during these negotiations and among the conferees has been ensuring that people who live in rural areas will have access to the same advanced technology and competition that we are seeking for the country and at affordable prices.").

granted the FCC separate authority under section 706 that is not subject to the standards and limitations of section 10. The Commission thus has an obligation to encourage incumbent LECs -- including those that are also BOCs -- to deploy advanced telecommunications capability and to use the regulatory tools authorized by section 706 to so encourage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Ann Morris, hereby certify that the foregoing, " REPLY COMMENTS OF SBC COMMUNICATIONS INC.," in RM 9244 has been filed this 4TH day of May, 1998 to the Parties of Record.

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